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Supreme Court, U.S.
FILED
JUL 15 2002
OFFICE OF THE CLERK

No. 01-1502

In the Supreme Court of the United States

ALLAN ELIAS, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTIONS PRESENTED

The Resource Conservation and Recovery Act of 1976 (RCRA), 42 U.S.C. 6901 *et seq.*, regulates the transportation, treatment, storage, and disposal of hazardous waste. Petitioner was convicted under RCRA's criminal provisions of improperly storing and disposing of hazardous cyanide-bearing waste that seriously injured an individual. The questions presented are:

1. Whether the court of appeals correctly rejected petitioner's defense that the United States loses its authority to enforce the criminal provisions of RCRA once the Environmental Protection Agency (EPA) authorizes a State to operate a RCRA hazardous waste program.

2. Whether the court of appeals correctly concluded that the United States adequately demonstrated that petitioner stored and disposed of hazardous waste.

3. Whether the court of appeals correctly rejected petitioner's defense that the United States had to show that the waste was hazardous through a particular test in an EPA guidance manual.

4. Whether, in the face of allegations of jury tampering, the court of appeals correctly placed the burden on the United States to show that the alleged jury tampering did not cause prejudice and placed the burden on petitioner to show that, notwithstanding the absence of prejudice, there existed juror bias.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. A1-A37) is reported at 269 F.3d 1003. An accompanying memorandum decision (Pet. App. A38-A44) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on October 23, 2001, and amended on December 21, 2001. A petition for rehearing was denied on January 4, 2002 (Pet. App. A127). The petition for a writ of certiorari was filed on April 4, 2002. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Following a jury trial in the United States District Court for the District of Idaho, petitioner was convicted on one count of storing or disposing of hazardous waste without a permit, knowing that his actions placed others in imminent danger of death or serious bodily injury, in violation of 42 U.S.C. 6928(e); two counts of improper disposal of hazardous waste without a permit in violation of 42 U.S.C. 6928(d)(2); and one count of making material false statements to government investigators, in violation of 18 U.S.C. 1001. Petitioner was sentenced to 204 months' imprisonment and ordered to pay restitution in the amount of $6.3 million. The court of appeals affirmed the conviction and sentence of imprisonment, but set aside the restitution order. Pet. App. A1-A35.

1. Congress enacted the Resource Conservation and Recovery Act of 1976 (RCRA), 42 U.S.C. 6901 *et seq.*, to address increasingly serious environmental and health dangers arising from the generation, management, and disposal of waste. Congress's overriding concern was "the effect on the population and the environment of the disposal of discarded hazardous wastes—those which by virtue of their composition or longevity are harmful, toxic or lethal" and "present a clear danger to the health and safety of the population and to the quality of the environment." H.R. Rep. 1491, 94th Cong., 2d Sess. 3 (1976). Through Subtitle C of RCRA, 42 U.S.C. 6921-6939e, Congress created a nationwide program for protecting the public from the dangers of improper hazardous waste disposal. Subtitle C establishes a "'cradle-to-grave' regulatory structure overseeing the safe treatment, storage and disposal of hazard-

ous waste." *United Techs. Corp.* v. *EPA*, 821 F.2d 714, 716 (D.C. Cir. 1987).

RCRA charges the Environmental Protection Agency (EPA) with responsibility to establish a comprehensive national regulatory program for hazardous waste management. EPA must identify hazardous wastes, 42 U.S.C. 6921; see 40 C.F.R. Pt. 261, which triggers notification requirements for facilities engaged in hazardous waste activity, 42 U.S.C. 6930. EPA must also prescribe regulatory standards for generators and transporters of hazardous waste and owners and operators of hazardous waste treatment, storage, and disposal facilities. 42 U.S.C. 6922-6924 (1994 & Supp V 1999); see 40 C.F.R. Pts. 262-266. In addition, EPA must establish a permit program for owners and operators of such facilities. 42 U.S.C. 6925 (1994 & Supp. V 1999) ; see 40 C.F.R. Pt. 270.

RCRA also creates a process by which a State may request EPA to "authorize" a state hazardous waste program to operate "pursuant to this subchapter," meaning Subtitle C of RCRA. See 42 U.S.C. 6926 (Pet. App. A128-A132). (Subtitle C of RCRA is codified as Subchapter III of Chapter 82 of Title 42 of the United States Code.) To receive authorization, a state regulatory program must be equivalent to and consistent with the federal program and must provide for adequate enforcement. 42 U.S.C. 6926(b).

RCRA directs EPA to ensure that hazardous wastes are managed nationally in a responsible manner. 42 U.S.C. 6902(b). At the same time, it has long been a federal goal and EPA policy to encourage and support States that seek authorization for their hazardous waste management programs. 42 U.S.C. 6902(a)(7). Recognizing both the national interest in consistent and effective implementation of the RCRA program and the

state interest in program administration at the local level, RCRA provides for the co-existence of independent federal and state authority in authorized States. Thus, while States can assume responsibility for program administration at the local level, EPA has continuing oversight responsibilities concerning the activities regulated under state programs. For example, EPA has authority to revoke a state-issued permit if the permittee fails to comply with RCRA requirements, 42 U.S.C. 6928(a)(3), and to withdraw program authorization if the State is not administering its program in accordance with RCRA, 42 U.S.C. 6926(e).

RCRA also vests the federal government with independent authority to take direct enforcement action in States with authorized hazardous waste programs. 42 U.S.C. 6928 (Pet. App. A133-A140). For instance, EPA may issue compliance orders and assess administrative civil penalties against those who violate RCRA in such States, and it may also request the Justice Department to commence a judicial action seeking injunctive relief and civil penalties. 42 U.S.C. 6928(a)(1). In either instance, Congress has directed EPA to give notice to the State before "issuing an order or commencing a civil action under this section." 42 U.S.C. 6928(a)(2). The United States may also seek federal criminal penalties against persons who knowingly violate RCRA requirements, including persons who fail to obtain, or violate the requirements of, "a permit under this subchapter." 42 U.S.C. 6928(d)-(e).

2. Petitioner owned Evergreen Resources, a fertilizer company located near Soda Springs, Idaho. Pet. App. A2. In August 1996, petitioner decided to store sulfuric acid in a 25,000-gallon tank that held at least one to two tons of cyanide-laced sludge. *Ibid.* Petitioner knew, based on his prior use of the tank, that the

sludge contained cyanide. *Ibid.*; *id.* at A38-A39. He decided that the sludge, which was hardened and more than a foot deep, had to be disposed of before he could use the tank for sulfuric acid storage. *Id.* at A2.

On August 26, 1996, petitioner ordered four of his employees, Bryan Smith, Gene Thornock, Darrin Weaver, and Scott Dominguez, to enter the tank and wash the sludge out of a valve opening in the end. Pet. App. A2. Despite Smith's repeated requests, petitioner failed to provide any safety equipment. *Ibid.* Consequently, Dominguez and Weaver entered the tank wearing only their regular work clothes. *Id.* at A2-A3. After about fifteen minutes, they realized that the sludge could not be washed out the small valve opening, and they exited. *Id.* at A3. Both complained of sore throats and nasal passages. *Ibid.*

The next morning, on August 27, 1996, petitioner met with his employees, who told him of the difficulties of the day before and the health effects they had suffered. Pet. App. A3. Smith again insisted on the necessary safety equipment. *Ibid.* Petitioner said he would provide safety equipment, but he directed his employees to commence cleaning the tank without the equipment and stated that he expected the tank to be cleaned out that morning. *Ibid.* On past occasions, petitioner had similarly failed to take adequate safety precautions to protect employees from cyanide exposure. *Id.* at A39.

After cutting a bigger drainage opening in the end of the tank, Dominguez and Weaver again entered the tank with no safety equipment. Pet. App. A3. About 45 minutes later, after they had emptied about one-third of the sludge through the hole onto the ground, Weaver shouted that Dominguez had collapsed. *Ibid.* Thornock and Smith unsuccessfully tried to get Dominguez out of the tank, which had only a 22-inch manhole at the top.

Ibid. When firefighters arrived to rescue Dominguez, he was in severe respiratory distress and in danger of dying. *Ibid.*

After extricating Dominguez, the fire chief asked petitioner whether cyanide might be in the tank. Pet. App. A3. Petitioner insisted that he had no knowledge of anything in the tank other than water and sludge, which the fire chief understood to mean mud. *Ibid.* After Dominguez was rushed to the hospital, the treating physician concluded that the most likely cause of his condition was cyanide poisoning. *Id.* at A3-A4. He called petitioner and asked whether the tank might contain cyanide, to which petitioner again replied no. *Id.* at A4. The doctor nonetheless ordered a cyanide antidote kit, to which Dominguez responded positively. *Ibid.* Blood tests showed extremely toxic levels of cyanide in his body. *Ibid.*

Dominguez now suffers from permanently debilitating injuries, including severe neurological impairment. Pet. App. A81; Tr. 1383-1385, 3226-3228. He exhibits symptoms like those associated with Parkinson's disease, with slow and rigid muscle movements, poor balance, and a very "flat" demeanor. Tr. 3194, 3199-3201. He cannot drive or hold a job or care for himself for any extended periods. Tr. 3268-3273. He has great difficulty feeding himself, and his parents must wake up several times a night to turn him over in bed. Tr. 3268-3269. His symptoms are classic results of cyanide poisoning. Tr. 3199-3200, 3216-3224, 3226-3227, 3523.

The day Dominguez was injured, petitioner told investigators that he had completed a confined space entry permit, but he declined to show it to them. Pet. App. A4. Early the next morning, petitioner visited an acquaintance at a nearby company, where he inquired about the requirements for confined space entries and

departed with a copy of a safety manual that spelled out the requirements for a confined space entry permit. *Ibid*. The permit that petitioner eventually provided to investigators stated that it was issued on August 27, 1996, at 10:30 a.m. *Ibid.*

Petitioner had a long history of failures to handle cyanide and confined space entries properly or to prepare his employees to do so. Pet. App. A38-A39. His previous failures and attempts to evade enforcement were exhaustively documented at trial. *E.g.*, Tr. 1938-1957, 2012-2034, 2074-2075, 2155-2164, 2182-2189, 2273-2331, 2343-2345, 2551-2562, 2826-2830, 3099-3104, 3182-3183.

3. A federal grand jury returned an indictment against petitioner. Pet. App. A4, A45. Count I charged that he had stored or disposed of hazardous waste without a permit, knowing that his actions placed others in imminent danger of death or serious bodily injury in violation of 42 U.S.C. 6928(e). Pet. App. A4-A5, A45. Counts II and III charged petitioner with improper disposal of hazardous waste without a permit in violation of 42 U.S.C. 6928(d)(2). Pet. App. A5, A45. Count IV charged him with a violation of 18 U.S.C. 1001 for making material misstatements relating to the confined space entry permit that he alleged was prepared on August 27, 1996. Pet. App. A5, A47. The jury found petitioner guilty on all four counts. *Id.* at A5, A45.

4. The court of appeals affirmed the conviction and the resulting seventeen-year prison sentence in a published opinion and an unpublished memorandum. Pet. App. A1-A44. Although petitioner raised and the court ruled on numerous issues, only four are relevant here. First, the court rejected petitioner's defense that the United States lacks authority to enforce the criminal penalties set out in RCRA in States with authorized

hazardous waste programs. *Id.* at A6-A14. Second, the court ruled that the United States had to demonstrate only that some of the sludge was hazardous in order to prove the RCRA counts, and it rejected petitioner's assertion that the United States had to examine what petitioner considered a more "representative sample" of all the waste from the tank. *Id.* at A15-A17. Third, the court held that the United States was not required to employ a test for "hazardous" levels of cyanide that EPA published in a guidance document in 1985 and that, in any event, that test did not undermine the conclusion that the waste here was hazardous. *Id.* at A21-A24. Fourth, the court affirmed the district court's conclusion that a new trial was not required on account of two jury members' belief that petitioner's brief greeting to another juror had consisted of a joking offer of a bribe. *Id.* at A28-A32.

ARGUMENT

1. Petitioner contends (Pet. 9-17) that RCRA does not grant the United States the authority to bring an enforcement action for violations of RCRA permitting requirements in States that are authorized, under RCRA, to issue state permits for storage and disposal of hazardous waste. See 42 U.S.C. 6926(b); see also 40 C.F.R. 272.651 (EPA's authorization of Idaho's program). The court of appeals correctly rejected that argument, which rests on a fundamental misapprehension of RCRA and the resulting hazardous waste regulatory program. See Pet. App. A6-A14.

a. As explained above (pp. 2-4, *supra*), RCRA creates a *national* program for regulation of hazardous wastes. It directs EPA to set out national standards identifying hazardous wastes, 42 U.S.C. 6921, and regulating their generation, 42 U.S.C. 6922, transportation,

42 U.S.C. 6923, and treatment, storage, and disposal, 42 U.S.C. 6924 (1994 & Supp. V. 1999). RCRA also creates a national program, administered by EPA, for issuing permits to persons who own or operate facilities for treatment, storage, and disposal of hazardous wastes. 42 U.S.C. 6925 (1994 & Supp. V. 1999). RCRA additionally provides, however, that individual States may develop their own hazardous waste programs. 42 U.S.C. 6926. If a State develops a program that is consistent with RCRA's requirements, and EPA "authorizes" the program, then the State program operates "pursuant to this subchapter" (i.e., Subtitle C of RCRA). 42 U.S.C. 6926(b).

The fact that EPA has authorized a state hazardous waste program does *not* mean that the federal government thereafter lacks authority to enforce RCRA requirements, including the requirements of the authorized state program. Rather, RCRA explicitly preserves that federal authority. See, *e.g.*, 42 U.S.C. 6927(a) (preserving EPA's authority to request information from "any person" who stores, treats, transports, handles, or disposes of hazardous wastes); 42 U.S.C. 6928(a) (preserving EPA's authority to issue a compliance order to "any person" who is in violation of "any requirement of this subchapter"); 42 U.S.C. 6928(d) (subjecting "[a]ny person" who knowingly violates RCRA requirements to federal criminal sanctions).

Petitioner's contrary view rests on a misreading of the relevant provisions. Petitioner mistakenly suggests that Section 6926 of RCRA allows States to "opt out of the federal RCRA program." Pet. 10; see *id.* at 14. Quite the opposite is true. Section 6926 allows States to *opt into* RCRA by developing a "hazardous waste program *pursuant to this subchapter*." 42 U.S.C. 6926(b)

(emphasis added). Contrary to petitioner's suggestion (Pet. 15-16), the RCRA provisions governing authorization of state programs do not require the delegation of federal authority to States. Hence, petitioner's suggestion that such a delegation would pose constitutional problems is without merit.[1]

Section 6926(d) of RCRA, entitled "Effect of State permit," makes clear that, upon EPA's authorization of the state program, the State's permitting actions "have the same force and effect as action taken by the Administrator under this subchapter." 42 U.S.C. 6926(d). As a consequence, the federal government may bring an enforcement action based on state permit violations, including the failure to obtain a permit. See, *e.g.*, *United States* v. *MacDonald & Watson Waste Oil Co.*, 933 F.2d 35, 44 (1st Cir. 1991). As the First Circuit explained in the specific context of criminal enforcement:

> The statute [Section 6928(d)] criminalizes "Any person" who acts without, or in respect to facilities lacking, "a permit under this subchapter." A permit under this subchapter is one issued by the Administrator of the EPA or by an authorized state. 42 U.S.C. § 6925.

933 F.2d at 44. See 42 U.S.C. 6925(c)(1) ("Upon a determination by the Administrator (or a State, if applicable), of compliance by a facility for which a permit is

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[1] RCRA does not require a State to develop a state hazardous waste program. If it does develop such a program, the State may enforce the requirements of its program as a matter of state law, whether or not the program receives EPA authorization. EPA's authorization of a state program pursuant to RCRA is significant because, among other things, that authorization allows the federal government to enforce the state permitting requirements under federal law. 42 U.S.C. 6926(d).

applied for under this section with the requirements of this section and section 6924 of this title, the Administrator (or the State) shall issue a permit for such facilities."); see also, *e.g.*, 42 U.S.C. 6928(a)(3) (authorizing EPA to issue orders suspending or revoking "any permit issued by the Administrator or a State under this subchapter").

Petitioner also misreads Section 6926(b)'s specific provisions for authorization of a state program. Pet. 10, 13-14. Those provisions direct that, once a State submits an application for authorization of a state program, EPA shall issue a notice of whether it expects to authorize the program. 42 U.S.C. 6926(b). Section 6926(b) then continues:

> Such State is authorized to carry out such program in lieu of the Federal program under this subchapter in such State and to issue and enforce permits for the storage, treatment, or disposal of hazardous waste * * * unless, within ninety days following submission of the application the Administrator notifies such State that such program may not be authorized * * *.

42 U.S.C. 6926(b). That passage, read in context, simply makes clear that, once a state program is authorized, permit applicants should submit their applications to the State rather than EPA. 42 U.S.C. 6926(b). See 40 C.F.R. 271.1(f) ("upon approval of a State permitting program, the Administrator shall suspend the issuance of Federal permits for those activities subject to the approved State program"). The passage provides no basis for concluding that the federal government may not continue to exercise its explicit enforcement powers under RCRA. See Pet. App. A8-A9.

Contrary to petitioner's assertion (Pet. 10), this Court's decision in *United States Department of Energy* v. *Ohio*, 503 U.S. 607 (1992), does not suggest that Section 6926(b)'s "in lieu of" language deprives the federal government of enforcement authority. The Court stated:

> RCRA regulates the disposal of hazardous waste in much the same way [as the Clean Water Act, 33 U.S.C. 1251 *et seq.*], with a *permit program* run by EPA but subject to displacement by an adequate state counterpart.

Id. at 611 (emphasis added). See Pet. App. A13 n.29. The Court did not questoin EPA's power to exercise enforcement authority in States that have EPA-authorized water pollution control programs. See 33 U.S.C. 1319(a), 1342(b), 1342(i).[2]

Petitioner also points to the fact (Pet. 10-11) that EPA's regulations for approval of state hazardous waste programs require States to include "remedies for violations of State program requirements." 40 C.F.R. 271.16. But there is nothing unusual in the fact that both the federal government and the state government can take enforcement action with respect to the same wrongs. The concept of dual enforcement is a familiar

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[2] Petitioner's reliance on a passage from RCRA's legislative history suggesting that a State may "*take over* the hazardous waste program" (Pet. 10 n.5 (emphasis added by petitioner)) is similarly misplaced. That passage plainly is speaking to state assumption of responsibility for issuance of permits, since RCRA's *text* explicitly preserves federal enforcement authority. See, *e.g.*, 42 U.S.C. 6928 (discussed in text *infra*). Indeed the more relevant legislative history, pertaining to Section 6928, indicates that the federal government retains its criminal enforcement authority. See Pet. App. A11-A13; *MacDonald*, 933 F.2d at 44-45.

feature of federal environmental law. See, *e.g.*, 33 U.S.C. 1319(a), 1342(b), 1342(i) (Clean Water Act); 42 U.S.C. 300g-3 (Safe Drinking Water Act); 42 U.S.C. 7413 (Clean Air Act). Indeed, in the preamble to the Federal Register notice first codifying Idaho's authorized hazardous waste program, EPA emphasized that it "retains the authority under [42 U.S.C. 6928] of RCRA to undertake enforcement actions in authorized states." Pet. App. A9 n.14 (quoting 55 Fed. Reg. 50,327-50,401 (1990)).

Moreover, RCRA's specific enforcement provisions explicitly preserve federal enforcement in States with authorized programs. Section 6928(a)(1) empowers EPA to issue a compliance order or seek civil judicial relief against "any person [who] has violated, or is in violation of any requirement of this subchapter." 42 U.S.C. 6928(a)(1). Because RCRA allows EPA or an authorized State to issue a permit, 42 U.S.C. 6925(c), the failure to obtain a permit from either is a violation of a "requirement[] of this subchapter." See Pet. App. A8-A10; *Wyckoff Co.* v. *EPA*, 796 F.2d 1197, 1199-1200 (9th Cir. 1986). Similarly, Section 6928(d) subjects "[a]ny person who * * * knowingly treats, stores, or disposes of any hazardous waste identified or listed under this subchapter * * * without a permit under this subchapter" to federal criminal prosecution. 42 U.S.C. 6928(d). Like Section 6928(a), Section 6928(d) does not distinguish between federal and state permits. Thus, Section 6928 preserves the full panoply of federal enforcement options. Pet. App. A13 ("the federal government retains both its criminal and its civil enforcement powers"); *MacDonald*, 933 F.2d at 44 (Section 6928(d) "does not limit prosecutions thereunder to

those who deal with facilities lacking a *federal* permit.").[3]

In short, when EPA authorizes a state program, the program operates "pursuant to" Subtitle C of RCRA (42 U.S.C. 6926), but that authorization does *not* disable the federal government from continuing to exercise its overarching authority to enforce Subtitle C through criminal sanctions. Pet. App. A13. Even if RCRA's "plain language and legislative history" were not sufficient to eliminate any doubt on that score, EPA's long-standing interpretation of RCRA would be entitled to deference as a reasonable construction of a regulatory statute by the agency charged with its administration.

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[3] As the court of appeals and *MacDonald* explain, the legislative history of Section 6928(d) confirms the meaning of the text. Pet. App. A11-A13 (quoting *MacDonald*, 933 F.2d at 44-45). As they specifically observe:

> The 1984 amendments [to Section 6928(d) of RCRA] increased the applicable criminal penalties and simply substituted "under this subchapter" for the references to the specific subsections under which permits, federal and state, may be granted. The new language, "without a permit under this subchapter," subsumed both state and federal permits, as both types are provided for within "this subchapter." The latter did not, therefore, in any way narrow the scope of federal criminal jurisdiction.

Id. at A12-A13. The text of other portions of Section 6828 also demonstrates that federal enforcement authority survives state authorization. For example, Section 6928(a)(2) directs EPA to notify a State before taking civil enforcement action in a State that has an authorized program. 42 U.S.C. 6928(a)(2). Additionally, Section 6928(d) makes specific reference to criminal sanctions for non-compliance with "regulations promulgated by the Administrator (or by a State in the case of an authorized State program) under this subchapter." 42 U.S.C. 6928(d)(3), (4) and (5).

Pet. App. A7-A9; see, *e.g.*, *Chevron U.S.A. Inc.* v. *Natural Res. Def. Council, Inc.*, 467 U.S. 837 (1984).

b. Petitioner is wrong in his assertions (Pet. 11-12, 14-16) that the court of appeals' construction of RCRA conflicts with decisions of this Court or another court of appeals. Neither this Court nor any court of appeals has ever held that the United States loses its enforcement powers under RCRA upon authorizing a State program. To the contrary, the courts of appeals have repeatedly affirmed federal convictions under RCRA based on unlawful activities in States with authorized RCRA programs.[4]

There is no merit to petitioner's contention (Pet. 14-15) that the court of appeals' decision in this case conflicts with *United States Department of Energy* v. *Ohio*, 503 U.S. 607 (1992). The Court in that case ruled that Congress had not waived the federal government's sovereign immunity from liability for civil penalties that a State sought to impose against a federal facility for alleged past violations of the CWA and RCRA. *Id.* at 611. Thus, the issue in that case bears no similarity

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[4] See, *e.g.*, *United States* v. *Henry*, 136 F.3d 12 (1st Cir. 1998) (New Hampshire); *United States* v. *Laughlin*, 10 F.3d 961 (2d Cir. 1993) (New York), cert. denied, 511 U.S. 1071 (1994); *United States* v. *Johnson & Towers, Inc.*, 741 F.2d 662 (3d Cir. 1984) (New Jersey), cert. denied, 469 U.S. 1208 (1985); *United States* v. *Dee*, 912 F.2d 741 (4th Cir. 1990) (Maryland), cert. denied, 499 U.S. 919 (1991); *United States* v. *Sims Bros. Constr., Inc.*, 277 F.3d 734 (5th Cir. 2001) (Louisiana); *United States* v. *Williams*, 195 F.3d 823 (6th Cir. 1999) (Tennessee); *United States* v. *Kelly*, 167 F.3d 1176 (7th Cir. 1999) (Wisconsin); *United States* v. *Freeman*, 30 F.3d 1040 (8th Cir. 1994) (Missouri); *United States* v. *Fiorillo*, 186 F.3d 1136 (9th Cir. 1999) (California), cert. denied, 528 U.S. 1142 (2000); *United States* v. *Self*, 2 F.3d 1071 (10th Cir. 1993) (Utah); *United States* v. *Hansen*, 262 F.3d 1217 (11th Cir. 2001) (Georgia), cert. denied, 122 S. Ct. 2326 (2002).

to the issue posed here. Petitioner nevertheless focuses on passages from the decision that rejected Ohio's contention that a *State's* assessment of civil penalties under an EPA-authorized state water pollution control program is permissible under Section 1323(a) of the Clean Water Act because those state-law penalties "aris[e] under Federal law" (33 U.S.C. 1323(a)). See 503 U.S. at 623-627. The Court recognized that "the complementary relationship between state and federal law" did not support the State's argument that "*state-law fines* thereby 'arise under Federal law.'" *Id.* at 625 (emphasis added). This federal prosecution, however, does not involve "state-law fines." The Court in no way suggested that the *federal government's* pursuit of federal criminal sanctions against an individual pursuant to Section 6928(d) of RCRA would be beyond the federal government's authority. As the court of appeals correctly recognized, that issue "was not an issue presented to or resolved by the *Ohio* court." Pet. App. A13-A14 n.29.

Petitioner is also wrong in asserting (Pet. 11-12) that the court of appeals' decision conflicts with *Harmon Industries, Inc.* v. *Browner*, 191 F.3d 894 (8th Cir. 1999) (reproduced at Pet. App. A145-A164). That case involved a federal government practice known as "overfiling." The federal government had initiated a civil enforcement action and continued that action after a State with an authorized program had resolved a state enforcement action on terms that the federal government believed to be inadequate. See 191 F.3d. at 897-898 (Pet. App. A150). As the court of appeals explained in this case, *Harmon* held that the federal government may not continue to pursue its own civil penalty action after a State that has an authorized program has settled the identical claim with the same defendant.

Pet. App. A10-A11. See 191 F.3d at 902 (Pet. App. A159) ("[W]e find that the EPA's practice of overfiling, in those states where it has authorized the state to act, oversteps the federal agency's authority under the RCRA."). But that court did *not* rule that EPA lacks authority to bring its own enforcement action in the absence of a state enforcement proceeding. See *id.* at 901 (Pet. App. A158) (EPA may proceed in accordance with Section 6928 "when the authorized state fails to initiate any enforcement action."); see also *id.* at 902 n.4 (Pet. App. A158 n.4) (reconciling its decision with *Wyckoff* on that basis).

As the court of appeals correctly recognized, *Harmon* "is not about if, but about when, the United States can bring a civil enforcement action in federal court after it has authorized a state program." Pet. App. A11 (quoting *United States* v. *Flanagan*, 126 F. Supp. 2d 1284, 1289 & n.3 (C.D. Cal. 2000)). Because the decision in *Harmon* dealt with an instance of the federal government's "overfiling" during a state civil action, and that decision expressly recognized that a federal enforcement action is permissible where, as here, there has been no state enforcement action, *Harmon* does not conflict with the decision in this case. (Indeed, in this case, the State of Idaho expressed its concurrence with the United States's criminal enforcement action. Govt. C.A. Supp. E.R. 58-59.) Hence, even assuming that *Harmon* is correct, that decision "does not support [petitioner's] contention that federal law is supplanted or that the United States lacks power to try him." Pet. App. A11.[5]

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[5] The United States District Court for the District of Colorado has declined to follow *Harmon*, concluding that it "incorrectly interprets the RCRA." *United States* v. *Power Eng'g Co.*, 125 F.

Petitioner is also mistaken in asserting (Pet. 12-13) that the decision of the court of appeals conflicts with *Dague* v. *City of Burlington*, 935 F.2d 1343 (2d Cir. 1991), rev'd in part, 505 U.S. 557 (1992). Contrary to what petitioner argues, that decision does not hold that the phrase "pursuant to this chapter" in RCRA's citizen-suit provision, 42 U.S.C. 6972(a)(1)(A), excludes suits alleging violations of permitting programs in authorized States. Indeed, that provision was not even at issue. The plaintiffs there had raised a claim under 42 U.S.C. 6972(a)(1)(A) but had not appealed its dismissal. 935 F.2d at 1348-1349, 1352. As relevant here, the decision in *Dague* states in dictum that "an EPA-authorized state hazardous waste program * * * can supersede the permit and notification requirements of [Subtitle C]." *Id.* at 1352. The decision does not bar citizens from bringing suit under RCRA to enforce permitting requirements in authorized States and does not address federal enforcement authority at all.

2. Petitioner contends (Pet. 17-22) that the court of appeals erred in failing to require the United States to show that the waste in question was hazardous based on what petitioner considered a more "representative sample" of the waste from the tank. Contrary to petitioner's arguments, the court of appeals correctly recognized that the government was under no obligation to test all of the cyanide-containing wastes in the tank and that there was ample evidence from which the jury could conclude that the waste was hazardous. Pet. App. A15-A17. That fact-specific decision is correct and does

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Supp. 2d 1050, 1059 (2000). That decision is currently on appeal to the United States Court of Appeals for the Tenth Circuit. No. 01-1217 (10th Cir. argued Mar. 20, 2002).

not conflict with any decision of this Court or another court of appeals.

To obtain convictions on the counts of the indictment under RCRA, the United States was required to prove that petitioner stored or disposed of hazardous waste without a permit. 42 U.S.C. 6928(d)-(e). EPA has defined "hazardous waste" by regulation to include solid wastes that have the characteristic of reactivity. 40 C.F.R. 261.3(a)(2)(i), 261.23 (Pet. App. A142-A143). Cyanide-bearing wastes are reactive, and thus hazardous, if a "representative sample" shows that the waste is capable of generating "toxic gases, vapors or fumes in a quantity sufficient to present a danger to human health or the environment." 40 C.F.R. 261.23(a)(5). A sample is "representative" if it "can be expected to exhibit the average properties of the universe or whole." 40 C.F.R. 260.10 (Pet. App. A141). In this case, a sample is sufficiently representative if it exhibits the average properties of the wastes that were removed from the tank, since those wastes were sufficient, by themselves, to establish storage and disposal violations. See Pet. App. A16-A17 (citing *In re Electric Serv. Co.*, 1 E.A.D. 947 (EPA Env. App. Bd. 1985)).

As the court of appeals explained, the United States did not need to show that all the waste in the tank was hazardous; rather, the government fulfilled its burden at trial by proving that petitioner had improperly stored or disposed of *some* hazardous waste. Pet. App. A16. Because (1) the waste samples that the United States' experts examined tested positive for cyanide, (2) the samples included waste that petitioner's employee was forced to remove from the tank, and (3) that employee became incapacitated and permanently injured through cyanide poisoning, the samples were sufficient to support the convictions. *Ibid.* As the court

of appeals observed, "[i]f a sample from one part of the tank contains wastes reactive enough to cause brain damage to someone, there can be no conceivable purpose in sending other people into the tank to extract more samples." *Id.* at A17.[6]

Petitioner's "hypertechnical interpretation" not only defies "common sense" (Pet. App. A17), it ignores the underlying purpose and import of EPA's regulations, which seek to avert the type of injury that occurred in this case. EPA requires "representative" samples to ensure that the hazardous characteristics of the material in question are properly identified. *Ibid.*; see Tr. 3324-3327. If a hazardous waste, such as cyanide-bearing sludge, is discovered in a tank, then "it's not necessary to go to every inch of the tank to see if there's more cyanide there." Pet. App. A17. It is sufficient if the sample demonstrates that the waste "can generate toxic gases, vapors or fumes, in a quantity sufficient to present a danger to human health or the environment." 40 C.F.R. 261.23(a)(5).

In any event, "the relevant question is whether, after viewing the evidence in the light most favorable to the prosecution, *any* rational trier of fact could have found the essential elements of the crime beyond a reasonable

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[6] Petitioner contends (Pet. 19 n.16) that, if he had only stored or disposed of "the few grams of cyanide-bearing waste tested," he would qualify as a small-quantity generator under EPA's regulations and would be exempt from prosecution. But petitioner was not prosecuted for those few grams, but for improper storage and disposal of wastes from which those samples were taken. Pet. App. A2. The samples were sufficient, together with the other evidence the government produced, to establish that the wastes were hazardous. Indeed, even if petitioner could have qualified as a small-quantity generator, he would still be subject to RCRA requirements. See 40 C.F.R. 261.5(a), (b) and (g).

doubt." *Jackson* v. *Virginia*, 443 U.S. 307, 319 (1979). The record here includes ample evidence from which a rational jury could conclude that the samples exhibited the "average properties" of the waste that was improperly stored and disposed of, including all the waste in the tank, and that the waste was hazardous. See 40 C.F.R. 260.10 (defining "representative sample"), 261.23(a)(5) (describing the characteristic of reactivity in the case of cyanide-bearing compounds).

First, the samples that were taken indicated that the wastes in the tank demonstrated the characteristic of reactivity. Tr. 3340-3347. Second, an expert explained at trial how the sampling of the sludge, under the circumstances, was representative and that there was no need to put those conducting the sampling at further risk by having them enter the tank to take more samples. Tr. 3344-3351, 3429-3434, 3463-3465. Third, a hazardous materials team that responded to the site additionally found hydrogen cyanide gas in samples taken from both inside and outside the tank. Tr. 1108-1110, 1180-1209. And fourth, petitioner's injured employee, who was directly exposed to the wastes in the tank, demonstrated the symptoms and permanent effects of cyanide poisoning. Tr. 3223-3228, 3194-3200.

The evidence adduced at trial, viewed in its totality, demonstrated beyond doubt that the waste within the tank could generate gases sufficient "to present a danger to human health" and was thus hazardous. 40 C.F.R. 261.23(a)(5). See *Huddleston* v. *United States*, 485 U.S. 681, 691 (1988) ("[I]ndividual pieces of evidence, insufficient in themselves to prove a point, may in cumulation prove it."). The evidence plainly was sufficient for the jury to have concluded, beyond a reasonable doubt, that the waste was hazardous under

the regulations. That factbound determination does not warrant review by this Court.[7]

3. Petitioner argues (Pet. 22-26) that he lacked fair notice of the standards under which he could be convicted because a sample of the waste was not hazardous under an EPA guidance manual, known as SW-846, that elaborated on a test for cyanide-bearing wastes. That non-binding guidance described a test method for determining whether cyanide-bearing waste is reactive. Contrary to petitioner's suggestion (Pet. 25), the guidance manual is not incorporated into EPA's regulations for purposes of determining whether a waste is reactive, and thus hazardous. See 40 C.F.R. 261.3(a)(2)(i), 260.11(a) and (a)(11), 261.23. In any event, his argument fails for two main reasons.

First, SW-846 did not purport to draw a line between what was and what was not hazardous waste. Instead, that guidance suggested a "quantitative threshold for toxic gas generation" above which waste was clearly hazardous, without denying that some wastes below that threshold would also be hazardous. Pet. App. A21-A22. That is, the guidance did not purport to indicate a "'safe harbor' for waste that emitted toxic gas below the threshold level." *Id.* at A24, A86. Petitioner admitted as much in his reply brief in the court of appeals. C.A. Rep. Br. 19. Thus, even if the United States were bound by SW-846, the fact that the waste at issue was

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[7] Petitioner suggests (Pet. 21) that the court of appeals' decision is in tension with *Renaud* v. *Martin Marietta Corp.*, 972 F.2d 304 (10th Cir. 1992), which observed, in the context of a tort claim, that "no one has any idea whether this [particular] sample is representative of the 'normal' contaminant concentration." *Id.* at 308. That remark, made outside the RCRA context, plainly does not give rise to a conflict among the courts of appeals.

not proven hazardous under that test would present no reason to question petitioner's conviction.

Second, petitioner's "fair notice" argument founders on the undisputed fact that petitioner did not even know of SW-846. Pet. App. A23. Although he argues that "fair notice" arguments do not depend on actual notice, Pet. 23-24, his argument is not really based on "fair notice" at all. Petitioner no longer contends that the underlying regulation would be impermissibly vague and that he would lack fair notice without the quantitative threshold provided by SW-846. The court of appeals rejected that argument, Pet. App. A17-A20, and petitioner does not renew it here. Rather, he now relies on the argument that EPA cannot disclaim SW-846 because EPA had used it for some purposes in the past. Pet. 22-23, 25-26. As the district court recognized, that argument rests on estoppel, not fair notice. Pet. App. A90-A91. Because such an argument is unavailable absent actual reliance by the party claiming estoppel, it is unavailable to petitioner here. *Ibid.*; see *United States* v. *Weitzenhoff*, 35 F.3d 1275, 1290 (9th Cir. 1993), cert. denied, 513 U.S. 1128 (1995).

4. Petitioner argues (Pet. 26-28) that the court of appeals erred by concluding that he bore the burden to show that he had been prejudiced by two jurors' belief that his brief greeting to another juror had consisted of a joking offer of a bribe. He mistakenly contends that this allocation of the burden conflicts with decisions of this Court and various other courts of appeals. *Ibid.*

Petitioner misapprehends the decision of the court of appeals. Contrary to his contention (Pet. 27), that court did not flout this Court's decision in *Remner* v. *United States*, 347 U.S. 227 (1954), by requiring him to carry the burden to show that any jury tampering did not prejudice him. The district court found that no juror

thought that he had tampered with the jury and that the United States had carried its burden of dispelling any associated presumption of prejudice. Pet. App. A123. The court of appeals affirmed the district court's findings as not clearly erroneous. *Id.* at A30-A32. Thus, the decision is consistent with the decisions that petitioner cites indicating that jury tampering raises a presumption of prejudice that the government bears the burden to dispel.[8]

The court of appeals referred to petitioner's burden in addressing a separate question: whether the jury was nevertheless biased against him even though no juror believed that he actually tampered with the jury. Pet. App. A32 & n.70. The district court addressed that issue separately from the "closely related" issue of jury tampering and noted that the defendant bears the burden of showing that a juror is biased. *Id.* at A10[illegible], A123. The district court concluded that petitioner had not carried the burden of showing any such bias. *Id.* at A123. The court of appeals affirmed, stating that "the district court's conclusion that [petitioner] had not borne his burden of showing juror bias appears correct." *Id.* at A32 (footnote omitted). That allocation of the burden of showing bias is consistent with this Court's decisions. *E.g.*, *Wainwright* v. *Witt*, 469 U.S. 412, 423 (1985); *Irvin* v. *Dowd*, 366 U.S. 717, 723 (1961). Petitioner cites no decisions that question that result.

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[8] Although petitioner is correct that there is some disagreement among the courts of appeals on whether the government always bears the burden of showing that jury tampering did not prejudice the defendant, Pet. 26-27 & n.18, the government carried that burden here and thus this case does not present an occasion for resolving the tension in those cases.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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JULY 2002